Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE ~~UNITED STATES~~

October Term, 1979
No. ~~79~~-1246

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the ~~United~~ States of America,

Real Party.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

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February, 1980.

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IN THE
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JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Real Party.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioners, John L. Connolly, et al. (hereafter called the "Trustees"), hereby move the Court for leave

to file the annexed petition for a writ of mandamus directed to the United States District Court for the Central District of California and Honorable David W. Williams, United States District Judge of said District, requiring that a district court of three judges be convened, pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284(1),[1/] to hear and determine the Trustees' complaint that 29 U.S.C. §§ 1301-1381 are unconstitutional as construed and applied to the Trustees.

Wayne Jett
Counsel for Petitioners.

1/ Section 2282 was repealed and section 2284 was amended by Public Law 94-381, 90 Stat. 1119, on August 12, 1976. Section 7 of that enactment states: "This Act shall not apply to any action commenced on or before the date of enactment." 90 Stat. 1120. This action was commenced on June 12, 1975.

IN THE
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October Term, 1979
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JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Petitioners,

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Real Party.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the above named Trustees of the Operating Engineers Pension Trust, join herein and pray that a writ of mandamus issue to the United States District Court for the Central District of California, and to Honorable David W. Williams, District Judge in said District, requiring that a three-judge court be convened to conduct further proceedings in Case No. CV 75-2037 DWW of that Court.

Opinions Below.

The original opinion of the Court of Appeals is reported at 581 F.2d 729 and appears at Appendix A (pp. 1a-12a) of this Petition. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for a rehearing en banc on the original opinion appears at Appendix B (p. 13b) of this Petition. The original decision of the United States District Court for the Central District of California is reported at 419 F.Supp. 737 and appears at Appendix C (pp. 14c-25c) of this Petition. The denial of the petition for certiorari to review

the original opinion of the Court of Appeals is reported at 99 S.Ct. 1279.

The Order re Three-Judge Court filed by the District Court is not officially reported and appears at Appendix D (pp. 26d-28d) of this Petition. The order of the Court of Appeals denying the petition for writ of mandamus to convene a three-judge court is not officially reported and appears at Appendix E (p. 29e) of this Petition. The Complaint for Declaratory Judgment, Damages, Injunction filed in the District Court on June 17, 1975, appears at Appendix F (pp. 30f-65f).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a). Adequate relief is unavailable in any other Court for the following reasons:

On September 14, 1979, the United States District Court for the Central District of California, Honorable David W. Williams presiding, filed its Order re Three-Judge Court declining to certify the need to convene a three-

judge court. On October 29, 1979, the District Court denied the Trustees' motion to reconsider and amend the Order re Three-Judge Court. On November 2, 1979, the Trustees filed a Petition for Writ of Mandamus in the U. S. Court of Appeals for the Ninth Circuit seeking an order that the three-judge court be convened. On January 14, 1980, an Order denying the Petition for Writ of Mandamus was filed in the Court of Appeals by Honorable Alfred T. Goodwin and Honorable Jerome Farris, Circuit Judges.

In a previous opinion, the Court of Appeals interpreted the challenged federal statutes as intending to impose "substantial, new, and in some cases, retroactive liabilities" on contributing employers of the Operating Engineers Pension Trust. The challenged statutes, by their terms, will become fully effective on May 1, 1980. The Trustees claim that the statutes are unconstitutional because, among other grounds, the statutory scheme is so irrational as to cause wholesale

employer withdrawals and resulting financial instability in multiemployer pension trusts, including the Operating Engineers Pension Trust. If the statutes are allowed to become effective on May 1, 1980, the Operating Engineers Pension Trust will be irreparably harmed by the severe disruption in collective bargaining negotiations scheduled to be held in mid-1980. The collective bargaining agreements of substantially all contributing employers of the Operating Engineers Pension Trust, comprising approximately 3,000 construction industry employers in Southern California and Southern Nevada, will be subject to termination and renegotiation between approximately May and October, 1980.

Pursuing an appeal to the Court of Appeals from an eventual final Judgment in the District Court cannot provide adequate relief, because such an appeal in the Ninth Circuit presently entails a delay of approximately 24 to 36 months. Therefore, requiring that the appeal procedure be followed is tanta-

mount to denial of the constitutional rights asserted by the Trustees. If the "substantial, new . . . retroactive liabilities" imposed on contributing employers as envisioned by PBGC and the Court of Appeals causes the termination of collective bargaining agreements and the interuption of employer contributions, no remedy will be available from any source to repair the financial losses and instability inflicted upon the pension plan of the Operating Engineers Pension Trust and other similar multiemployer pension trusts.

Question Presented.

Shall a writ of mandamus issue to require convening a three-judge court when substantial constitutional questions are presented and irreparable harm to the petitioners is imminent?

Statutes Involved.

This case involves 28 U.S.C. §§ 2282 and 2284, 62 Stat. 968, as applicable to cases filed prior to August 12, 1976 (see note 1, supra, p. 2.), which provide as follows:

"Section 2282. An interlocutory or permanent injunction

restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

"Section 2284. In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

. . .

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and

determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application. . . ."

The statutes challenged as repugnant to the Constitution are 29 U.S.C. § 1102(34), (35), 88 Stat. 838, and 29 U.S.C. §§ 1301-1381, 88 Stat. 1003-1035. These provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") are voluminous and separately presented for convenience.

Statement of the Case.

The Court of Appeals interpreted ERISA as specifically intending to impose "substantial, new, and in some case retroactive liabilities" on employers who are obligated by collective bargaining agreements to make certain payments to the Operating Engineers Pension Trust. (App. p. 7a.) In so ruling, the Court of Appeals held that

the pension plan of the Operating Engineers Pension Trust is a "defined benefit plan", thereby reversing the District Court's earlier ruling that the pension plan is a "defined contribution plan" excluded from the coverage of ERISA's plan termination insurance provisions by section 4021(b)(1) of the Act, 29 U.S.C. § 1321(b)(1). The Court of Appeals remanded the case to the District Court for consideration of the constitutional issues presented by the complaint. (App. p. 12a.)

When this Court denied the Trustees' petition for a writ of certiorari seeking review of the statutory interpretation adopted by the Court of Appeals, the Trustees asked the District Court to act upon their application for an order convening a three-judge court. Taking the application under advisement in April, 1979, the District Court filed its order on September 14, 1979, declining to convene a three-judge court on grounds that no substantial constitutional question is presented by the

complaint. The District Court's conclusion was based upon reasoning that the tax exempt status of the Operating Engineers Pension Trust is derived from ERISA and that the Trustees are precluded from attacking the constitutionality of a statute from which the Pension Trust derives benefit. The District Court cited only Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 (1947), a case in which a federal savings and loan association attempted to challenge the constitutionality of a provision of the statute authorizing creation of such associations.

The Trustees filed a motion for reconsideration in the District Court, seeking to bring into sharper focus the precise constitutional questions raised by the complaint and showing that the Fahey v. Mallonee holding was inapposite to each of these questions. The Trustees' motion was denied on October 29, 1979. Four days later, the Trustees filed a petition for writ of mandamus in the Court of Appeals. The Court of Appeals denied the petition without a

hearing on January 14, 1980.

While the petition for writ of mandamus was pending in the Court of Appeals, PBGC filed a motion for summary judgment in the District Court requesting that final judgment be entered against the Trustees. At a hearing on November 19, 1979, the District Court declined to grant summary judgment pending disposition of the mandamus proceedings.

REASONS FOR GRANTING THE WRIT.

1. Mandamus Proceedings Are Properly Invoked to Remedy a District Court's Refusal to Convene a Three-Judge Court.

The U. S. Court of Appeals for the District of Columbia Circuit has recognized that mandamus proceedings are the appropriate means to remedy an improper refusal to convene a three-judge court for trial of constitutional issues. Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965). The U. S. Court of Appeals for the Fifth Circuit has used even more expeditious procedures for convening a three-judge court when the appropriate facts come to the

attention of the Chief Judge of the Circuit. Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968). The expedited review provided by mandamus proceedings is particularly necessary to review the denial of a three-judge court, because the Court of Appeals has no jurisdiction to reach the merits of the constitutional issues even after the delay of the normal appellate process. 9 Moore's Federal Practice ¶ 110.03[3], p. 73. While the Court of Appeals for the Ninth Circuit has recognized that the determination of the existence of a substantial constitutional question divests the court of appeals of further jurisdiction and requires remand for a hearing before a three-judge court, Dillenburg v. Kramer, 469 F.2d 1222, 1223-24 (9th Cir. 1972), no officially published opinion has established the availability of a writ of mandamus to convene a three-judge court in the Ninth Circuit. Thus, while the basis of the Court of Appeals' denial of the requested writ of mandamus in this case is unclear, that ruling by the Court of Appeals was improvident, and the

requested writ of mandamus is properly available in this Court.

2. Constitutional Claims Are Insubstantial Only If the Prior Decisions of this Court Inescapably Render The Claims Frivolous.

> "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of [determining whether a three-judge court is required]. A claim is insubstantial only if 'unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59 (1973).

3. The Complaint Raises Substantial Claims of Constitutionality.

The Complaint frames the issues by first alleging that written documents establish the relationships between the Operating Engineers Pension Trust and its contributing employers, making clear that the financial obligations of the

employers to the Trust are limited to making timely payments of amounts specified in collective bargaining agreements. The Complaint further alleges that the challenged statutes as interpreted by PBGC invalidate the pertinent provisions of the collective bargaining agreements and trust document and impose additional liabilities on the contributing employers. Indeed, these allegations are established as fact by the decision of the Court of Appeals. (App., pp. 4a, 6a.) The Complaint further alleges that giving effect to the statutes as administered by PBGC would impair the contract rights of the Trustees, the Union, the contributing employers and the participants of the Pension Trust. In addition, the Complaint alleges that the Trustees, the Union, the employers and the participants would be deprived of their property without due process of law and without just and adequate compensation by giving effect to the statutes.

The constitutional issues which the Complaint seeks to raise include the

following:

(A) May a federal statute impose substantial new liabilities retroactively on selected employers who have entered into private agreements concerning pension plans without taking property in violation of the Fifth Amendment to the Constitution?

(B) Is the enacted statutory scheme of pension plan "termination insurance", as applied to multi-employer pension trusts, so irrational as to be a violation of the constitutional guarantee of due process of law?

(C) Does Congress exceed its power under the Commerce Clause of the Constitution in enacting a statute which seeks to selectively improve the retirement security of certain citizens whose employers have entered into private agreements concerning pension plans?

(D) Does the statutory scheme of Title IV of ERISA [29 U.S.C. §§ 1301-1381], under which PGBC takes property from the Trustees and

from contributing employers and transfers that property to persons who are beneficiaries of other private pension plans, constitute a taking of private property for the private use of others, and without compensation, in violation of the Fifth Amendment?

(E) Does the Fifth Amendment protect the rights of participants and beneficiaries of the Operating Engineers Pension Trust in their long term, private arrangements for retirement security against federal statutes which discourage future participation by employers?

If any one of these questions is constitutionally substantial (i.e., unless previous decisions of this Court foreclose dispute and leave no room for controversy on any one of the issues), a three-judge court is to be convened to determine the merits.

4. Prior Decisions of this Court Do Not Foreclose Controversy And, Indeed, Support the Merits of the Constitutional Claims Presented.

The only case cited by the District

Court as dispositive of constitutional questions presented in this action, Fahey v. Mallonee, supra, involved a federal savings and loan association organized under Section 5 of the Home Owners Loan Act of 1933. The association brought suit to obtain a declaration that Section 5(d) of that Act was unconstitutional. This Court held that Section 5 contained the conditions and authority for creation of federal savings and loan associations, and that an association created pursuant to that authority could not then attack selected conditions of the enabling statute.

This case is clearly distinguishable from Fahey v. Mallonee. The Operating Engineers Pension Trust was not created under Title IV of ERISA, and the Pension Trust did not derive its tax exempt status from ERISA. The creation of the Pension Trust, the status of the Pension Plan as a qualified plan under Internal Revenue Code Section 401(a) [26 U.S.C. § 401(a)], and the tax exempt status of the Pension Trust under IRC § 501(a) [26 U.S.C. § 501(a)] predated the enactment

of ERISA by fourteen years. Thus, the "tax benefit" enjoyed by the Pension Trust and its participants are derived from a different, pre-existing federal statute, and not from the statutory scheme being challenged as in Fahey v. Mallonee. This distinction is most important because only in this circumstance does the constitutionally significant concern for retroactively imposed liabilities arise. The statute in this case attempts to impose new liabilities based on business operations which occurred during the fourteen years prior to enactment of the statute. Fahey v. Mallonee cannot foreclose controversy in this case, because Fahey v. Mallonee involves no element whatsoever of retroactively imposed liabilities.

Recent decisions of this Court involving legislative attempts to impose pension liabilities on employers retroactively add considerable weight to the merit of the constitutional claims presented by petitioners. In

Malone v. White Motor Corporation, ___ U.S. ___, 98 S.Ct. 1185 (1978), this Court remanded the case "to consider on remand the contentions that the Minnesota Pension Act impairs contractual obligations and fails to provide due process in violation of the U. S. Constitution." Id., 98 S.Ct. at 1195. Thereafter, the Minnesota Pension Act was declared invalid as an unconstitutional impairment of contract in Allied Structural Steel Company v. Spannaus, ___ U.S. ___, 98 S.Ct. 2716 (1978). This Court found objectionable the provisions of that pension legislation which imposed "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees" and which "grossly distorted the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substantially beyond the terms of its employment contracts." Id., 98 S.Ct. at 2725. When this Court has so recently declared invalid state legislation with a similar retroactive

impact, the District Court and the Court of Appeals have erred grievously in denying a timely hearing on the merits of the Trustees' constitutional claims.

Regarding the Trustees' claim that the statutory scheme is irrational, there now exists a "national consensus" that Title IV of ERISA is completely unworkable and would be highly destructive to PBGC and to multiemployer pension trusts if put into effect. The statute would encourage financially weak pension plans to throw their liabilities onto the central "insurance" system, while pressuring contributing employers to withdraw from participation in any multiemployer pension trust. Note, "ERISA's Title IV and the Multiemployer Pension Plan", Duke Law Journal, Vol. 1979:644, 671-674. PBGC has conceded this irrationality of the statute to the Congress and to the public. If PBGC will not so concede in this Court, then the Trustees can provide convincing proof of these irrational effects of the statute. Such an irrational statutory scheme cannot meet the constitutional

requirements of due process of law. Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 15-20, 96 S.Ct. 2882, 2892-94 (1976).

Referring to the Trustees' claim that selective improvement of retirement security exceeds the power of Congress, this Court has held that general improvement of retirement security by retroactive imposition of new liabilities for past services violates due process and exceeds the scope of Congressional power under the Commerce Clause. Railroad Retirement Board v. Alton Railroad, 295 U.S. 330, 354, 362, 55 S.Ct. 758, 764 (1935). In Allied Structural Steel Co. v. Spannaus, supra, this Court expressed concern for legislation with a "narrow aim" directed "only at those [employers] who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees." Id., 98 S.Ct. at 2726.

Finally, regarding petitioners' fourth claim of unconstitutionality, the Supreme Court has held that the

Fifth Amendment protects "any significant taking of property", Fuentes v. Shevin, 407 U.S. 67, 84-87, 92 S.Ct. 1983, 1996-97 (1972). Multiemployer pension trust arrangements provide for the common pooling of significant portions of employees' compensation, and for allocation of such assets among previously retired participants and active employees. The rights of the participating employees to be secure in their existing trust arrangements for the preservation of property to be used as future retirement income is a protected property interest.

Scholarly analysis does not permit a view that previous decisions of this Court foreclose controversy on the constitutional issues presented by this case. "ERISA's Title IV, etc.", Duke L.J., supra, pp. 661-671. A speedy trial on the merits of the constitutional issues presented should be ordered.

CONCLUSION

The petition for writ of mandamus should be granted and an appropriate order issued requiring the convening of

a three-judge court to determine the constitutional claims presented in Case No. CV 75 2037 DWW of the Central District of California.

Respectfully submitted,
Wayne Jett
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. CONNOLLY, et al., etc., Appellees,	)	
vs.	)	No. 76-2777
PENSION BENEFIT GUARANTY CORPORATION, etc., Appellant.	)	OPINION

On Appeal from the United States District Court for the Central District of California.

Filed: May 4, 1978. Entered: May 9, 1978.

Before ELY and MERRILL, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

This is an appeal by the Pension Benefit Guaranty Corporation (hereinafter referred to as PBGC) from a summary judgment entered in favor of the Board of Trustees of the Operating Engineers Pension Trust (Trustees) which exempted the Operating Engineers Pension Plan (Plan) from coverage under the insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 USC 1001 et seq. (ERISA or Act).

Federal jurisdiction over this action exists pursuant to 29 USC 1303(f).

On December 1, 1974, the Trustees paid a termination insurance premium of $12,043.00 to the PBGC. On April 10, 1975, the Trustees applied to the PBGC for a determination that the Plan was a defined contribution plan exempt from coverage under the insur-

*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

ance provisions contained in Title IV of the Act, 29 USC 1301 et seq. The PBGC informed the Trustees that the Plan was a defined benefit plan subject to the plan termination insurance coverage. Thereafter, the Trustees made a demand for return of their termination insurance premium, which was refused by PBGC.

On June 17, 1975, the Trustees filed a complaint in the district court for a declaratory judgment, damages and injunctive relief against the PBGC, challenging its determination that the Plan was a defined benefit plan subject to insurance coverage. Upon cross motions for summary judgment, the district court granted summary judgment in favor of the Trustees. *Connolly v. Pension Benefit Guaranty Corp.*, 419 F. Supp. 737 (C.D. Calif. 1976). In its order the district court declared the Plan to be a defined contribution plan exempt from insurance coverage under the Act, enjoined the PBGC from acting inconsistently therewith, and required the PBGC to return the Trustees' premium payment. *Connolly v. PBGC, supra* at 741-42. This appeal followed.

Initially it should be noted that the determination of the PBGC herein is entitled to great deference in the construction and application of ERISA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *General Electric v. Gilbert*, 429 U. S. 125, 141-42 (1976), quoting from *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1940), the Supreme Court stated:

> "'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority do constitute a body of experience and informed judgment to which courts and litigants ma, properly resort for guidance. The weight of such a judgment in a particular case

> will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"

The Operating Engineers Pension Trust is a joint-labor-management trust established in conformance with §302(c)(5) of the Labor Management Relations Act of 1947, as amended in 1959, 29 USC 186(c)(5). This trust was created in 1960 by agreement between eleven home builders associations and the International Union of Operating Engineers. The trust agreement created the multiemployer pension plan at issue here. The Plan is a tax qualified employee pension plan within the meaning of §4021(a)(2) of ERISA, 29 USC 1321 (a)(2). It is administered by a fourteen-member Board of Trustees appointed in equal part by the employers and the union. The individual plaintiffs are the trustees of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which their employees may draw benefits when they reach a stated age of retirement.

Under the pension trust, the employers periodically enter into collective bargaining agreements to establish the amount of their contribution to the Plan. In fulfillment of their obligation under those agreements, the employers contribute a certain amount of money to the Plan each month. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement.

The monthly amount of the pension payable to an eligible participant is determined by multiplying the

Pension Factor in the Plan by the employee's Pension Credits and Prior Service Credits. The Pension Factor is an actuarial tool, calculated to translate plan experience into retirement benefits. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and any variance between actual and anticipated employer contributions and delinquencies. The Pension Factor is periodically revised by the Trustees.

The Pension Credit is a service-related formula determined in part by the amount of time spent on the job by the participant. The Plan also provides for some participants to be entitled to Prior Service Credits, for time spent on the job prior to the execution of this trust and Plan. Pension Credits are earned even if the employer fails to contribute the full amount of his obligation. The employee receives the appropriate pension benefit, as calculated by the above described formula, even though sufficient contributions have not been made on his behalf by his employer to the Plan.

By the express terms of the Plan, the employer's sole obligation to the pension fund is to pay such contributions as required by the collective bargaining agreements. The trust agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the fund. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.

ERISA is the product of several years of legislative effort to improve the American pension system. ERISA is a complex piece of legislation which addresses itself

to many problems. One of the foremost concerns of Congress in enacting the Act was to assure workers that retirement benefits would be available when needed. 29 USC 1001(a), (c) provides:

> "The Congress finds that . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to requisite funds to pay promised benefits may be endangered; that owing to the termination of plans before adequate funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .
>
> "It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to . . . meet minimum standards of funding, and by requiring plan termination insurance."

Consistent with ERISA's remedial function, Congress sought to effectuate the purpose of the Act as far as possible. In a report accompanying an earlier version of the bill, the Senate Committee on Labor and Public Welfare stated:

> "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973).

The issue before the Court is whether the Plan is a defined benefit plan under 29 USC 1002(35) or an individual account or defined contribution plan

under 29 USC 1002(34). If the Plan is a defined benefit plan, it is covered by the termination insurance provisions of the Act. If it is an individual account or defined contribution plan it is not covered by the termination insurance provisions, 29 USC 1321(b)(1), unless the Plan is a "plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." 29 USC 1321(c)(1). By definition, any plan that is not an individual account or defined contribution plan, must necessarily be a defined benefit plan. 29 USC 1002 (35).

The district court ruled that the Plan is a defined contribution plan, not subject to termination insurance coverage under ERISA. This determination is erroneous.

In its decision the district court looked to the obligation which the employers participating in the Plan have contractually agreed to assume. Because the employers have agreed only to make specified contributions, and have disclaimed any obligation to pay any pension benefit, the district court held that the plan was a defined contribution plan under which no fixed benefit is promised. The district court reached its conclusion by considering that to subject the Plan to ERISA's termination insurance provisions would force upon the employer a greater obligation and liability than he had originally agreed to in his contract. *Connolly v. PBGC*, 419 F. Supp. at 740.

However, this is precisely what the termination insurance provisions of the Act were intended to do. Whenever the PBGC pays pension benefits to participants of defined benefit plans which have terminated with

insufficient assets to pay the benefits promised, (29 USC 1322), the PBGC is entitled to recover the amount of such benefits from the employers who maintained the terminated pension plan, up to an amount not exceeding thirty percent of the net worth of each employer involved. 29 USC 1362-1368. The precise intent of these sections was to impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan.

29 USC 1321(b) provides that termination insurance coverage does not extend to any plan,

> "(1) which is an individual account plan, as defined in paragraph (34) of section 1002 of this title . . ."

29 USC 1002(34) provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The statutory definition of an individual account or defined contribution plan contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan. The Plan does not provide for an individual account for each participant. Contributions on behalf of participants

are pooled in a general fund. While a record of contributions received on behalf of a participant is maintained by the Trustees, the participant has no right, title, or interest in these amounts. Under the structure of the Plan, no purpose is served in providing an individual account for each participant. The amount of a participant's benefit at retirement is not based on the amount of contributions paid on his behalf into an account. Rather the benefit is determined by a service related formula, Pension Credits plus Prior Service Credits multiplied by the Pension Factor. The participant is entitled to receive that amount even though a sufficient amount of contributions has not been made on the participant's behalf.

The legislative history of ERISA clearly demonstrates that the primary purpose for termination insurance is to insure the payment of benefits in the event a plan terminates before it is fully funded. Legislative History of the Employee Retirement Income Security Act of 1974, at 213, 1830-31, 1865-72, 2361, 3371, 3373, 4802 (1976) (hereinafter cited as *Legis. Hist.*)

> "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans.

Legis. Hist. at 1094.

In the case of a true individual account plan, there is no possibility that the plan would terminate while being underfunded. Under such a plan, a separate account is kept for each covered employee, and the employee's accrued benefit at all times is simply "the balance of the individual's account." 29 USC 1002(23)(b). Thus by definition, an individual account plan

can never be underfunded. Consequently, the funding provisions of ERISA, subject to certain exceptions, do not apply to such a plan. 29 USC 1081(a)(8). Individual account plans are excluded from ERISA's funding rules because these plans do not specify any benefit beyond the balance of each individual's account at the time it is disbursed.

For a similar reason, an individual account plan is also excluded from termination insurance coverage. 29 USC 1321(b)(1). Congress concluded that in the case of a true individual account plan there was no need for termination insurance, just as there was no need for rules as to the funding of such an account. Since the participant is merely entitled to benefits determined by his own account, there is no unfunded amount to insure. *Legis. Hist.* at 1149.

Defined benefit plans, on the other hand, are subject to being underfunded for a variety of reasons because the benefits are not defined as the eventual balance in the individual's account. A defined benefit plan may provide benefits for service prior to the inception of the plan. In such a case, these prior service benefits need not be funded immediately, but may be amortized over thirty or forty years. 29 USC 1082(b)(B). As stated earlier, the Plan at issue provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits.

A funding deficiency in the Plan may also occur when the Trustees, through the use of the Pension Factor, establish pension benefits in excess of the amount of contributions received during the term of the collective bargaining agreement. Under the type

of plan involved herein, if actuarial assumptions and calculations used in establishing the Pension Factor are correct as of the beginning of the term of the collective bargaining agreement, and the agreed upon employer contributions are adequate and paid when required, there would be no funding deficiency by reason of miscalculation during the term of the collective bargaining agreement. However, when anticipated contributions, relied upon in establishing benefits, exceed actual contributions unfunded liability may occur..

The risk of termination of a multiemployer Taft-Hartley pension plan, such as the plan before the Court, is significantly less than in a single employer plan, because of its larger economic base. Indeed, an effort was made to exempt multiemployer plans from funding and/or termination insurance because of their relatively remote likelihood of termination. However, these proposals for outright exemption of multiemployer plans were rejected. Collectively bargained multiemployer plans were not exempted from the requirement that unfunded past service liability be amortized. Rather, such plans were granted an additional ten years beyond the standard thirty-year period within which to amortize the unfunded past service liability. 29 USC 1082(b)(2)(B).

> "This recognizes that multiemployer plans generally have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties."

Legis. Hist. at 3317.

Recognition of the financial strength of a multiemployer plan is also contained in ERISA's insurance program. With respect to termination insurance, the statutory multiemployer plan premiums were established at one-half the rate for single employer plans. 29 USC 1306(a)(3)(B). The multiemployer plan's lower risk of termination was apparently sufficient to justify a different premium rate; however, it was not sufficient to warrant total exemption from termination insurance coverage.

> "In view of the relatively minor incidence of multiemployer plan terminations the conferees determined to delay mandatory coverage of multiemployer plan terminations until January 1, 1978, but to commence premium payments by such plan as of date of enactment to build up reserves in the event the Pension Benefit Guaranty Corporation extends discretionary coverage prior to that date. It is to be expected that this discretionary coverage will be extended fully to protect employees benefits in multiemployer plans.
>
> "The conferees had no intention whatsoever of treating workers in these plans as 'second-class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."

Legis. Hist. at 4767.

The district court also held that 29 USC 1321(c)(1) was applicable to the Plan. 29 USC 1321(c)(1) provides:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit

is promised if the employer or his representative participated in the determination of that benefit."

The district court reasoned that the independent fiduciary duties of the Trustees necessarily precluded any characterization of the Trustees as employer representatives participating in the determination of pension benefits. *Connolly v. PBGC*, supra at 741.

In light of this Court's determination that the plan is not an individual account plan, and thus not exempt from termination insurance under 29 USC 1321(b)(1), we do not reach the issue of whether 29 USC 1321(c)(1) is applicable to the case at bar.

...The district court's decision to proceed with the statutory construction issue without convening a three-judge court was permissible. See *Hagans v. Lavine*, 415 U. S. 528, 543-44 (1974).

The constitutional issues sought to be raised by the plaintiffs were not reached in the district court, and thus not properly before this Court. At this time, the Court makes no ruling with respect to any constitutional issues which the parties may wish to present on remand. Generally, a reviewing Court should remand a case to the district court for consideration of a question not previously considered there. *Boire v. Miami Herald Publishing Co.*, 343 F. 2d 17, 25 (5th Cir.) *cert. denied* 382 U. S. 824 (1965). This Court holds only that: The Plan involved herein is not an individual account plan as defined by 29 USC 1002(34) and thus not exempt from the termination insurance program under 29 USC 1321(b)(1); and that the employer's disclaimer of liability for the payment of benefits does not convert the Plan into an individual account plan.

Accordingly, this case is Reversed and Remanded.

APPENDIX B

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CONNOLLY, et al., etc.,
Appellees,
vs.
PENSION BENEFIT GUARANTY CORPORATION, etc.,
Appellant.

No. 76-2777

ORDER

Filed: Sept. 6, 1978. Entered: Sept. 8, 1978.

Before: MERRILL and ELY, Circuit Judges, and HARPER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Ely has voted to reject the suggestion for a rehearing in banc and Judges Merrill and Harper have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C

APPENDIX C.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, Plaintiffs, vs. PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America, Defendant.	)	No. CV 75-2027-DWW ORDER GRANTING SUMMARY JUDGMENT

Entered: Feb. 12, 1976.

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 U.S.C. § 186(c)(5). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the international union of operating engineers, local union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to administer the Pension Fund and

to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part

of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 30% of the net worth of the employer's business. 29 U.S.C. § 1362 (a) and (b). Not all types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan—
> (1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiffs contend that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 U.S.C. § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendant's legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be a formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court

determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall

be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any

Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The

Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually to have prepared an actuarial evaluation of the fund which shall consider the actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by Section 1002(34). That section defines an individual account plan as a plan which provides

for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retire-

ment benefit is based on past service. The parties stipulate that a participant is entitled to a pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 U.S.C. § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining

agreement. The trustees are the ones who made a determination of the benefits, and this scheme includes no such participation on the part of the employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 U.S.C. § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., etc.,	)	No. 75-2037 DWW
Plaintiffs,	)	ORDER RE
vs.	)	THREE-JUDGE
PENSION BENEFIT GUARANTY CORPORATION,	)	COURT
Defendant.	)	

Plaintiffs, trustees of the Operating Engineers Pension Trust, move for convocation of a three-judge court to hear its constitutional claim that regulations of the Pension Benefit Guaranty Corporation infringe upon their right to contact and deprive them of property without due process. The case, filed in 1975, predates Public Law 94-381, 90 Stat. 1119, which amended the provisions for a three-judge court. However, Section 7 of that enactment specifically makes that Act not applicable to actions commenced before the enactment. The case is before this

court on remand from the Court of Appeals, which had reversed this court's ruling based upon its construction of the statute. This court had agreed with the Trustees that their pension plan was excluded from the scope of the regulations complained [sic] of which plaintiffs complain.

Trustees assert that because they must make certain additional payments under ERISA beyond their contractual provision, that their right to contract has been infringed, and that there is a due process violation. This court considers the question, and has determined that as a matter of law there is no substantial constitutional question raised warranting the convening of a three-judge court. The Court of Appeals made clear in its order of reversal and remand that the pension plan at issue fell under the provisions of ERISA. As a qualified pension plan under ERISA, the plan is a beneficiary of the tax benefits provided by the law, as well as being required to conform to the complained-of regulations issued by the

agency entrusted with administration of provisions of ERISA. The Supreme Court has made clear that in claims of infringement of the constitutional right to contract and of a deprivation of property without due process, a party must accept the responsibilities imposed by a governmental scheme as part of its distribution of benefits, absent other due process violations. Fahey v. Mallonee, 332 U.S. 245 (1947). There is no allegation that the regulations about which plaintiffs complain were adopted in a manner contrary to due process or other rule-making requirements.

This Court may decline to certify the need to convene a three-judge court when the constitutional question presented is insubstantial. I therefore decline to do so.

IT IS SO ORDERED.

DATED: This 13th day of September, 1979.

/s/

DAVID W. WILLIAMS,
United States District Court

APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. CONNOLLY, C.V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, et al.,	)	No. 79-7580
	)	D.C.#CV75-2037 DWW CENTRAL CALIFORNIA
Petitioners,	)	
vs.	)	ORDER
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	FILED JAN 14 1980 RICHARD H. DEANE CLERK, U.S. COURT OF APPEALS
Respondent,	)	
and	)	
PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation, etc.,	)	
Real Parties.	)	

Before: GOODWIN and FARRIS, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

APPENDIX F

APPENDIX F

WAYNE JETT
3055 Wilshire Boulevard
Suite 420
Los Angeles, Calif. 90010
(213) 380-2082

Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, Plaintiffs,	) NO. 75 2037 DWW)) COMPLAINT FOR) DECLARATORY) JUDGMENT,) DAMAGES,) INJUNCTION) [29 U.S.C.) § 1303(f)]) [28 U.S.C.) § 2201]) [F.R.C.P.) Rule 57]

vs.)
)
PENSION BENEFIT GUARANTY)
CORPORATION, a non-profit)
corporation established)
within the Department of)
Labor of the United States)
of America,)
)
Defendant.)
_____)

1. The jurisdiction of this Court is invoked under Section 4003(f) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1303(f)].

2. Plaintiffs JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. COREIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON (herein called the "Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with Section 302(c)(5) of

the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. § 186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called the "Corporation") is a non-profit corporation established within the Department of Labor of the United States of America by Section 4002 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1302].

5. The Trustees administer a pension plan (herein called the "Plan") established pursuant to the Trust. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed in 1960 by certain employers (herein called the "Employers") and the International Union of Operating Engineers, Local Union No. 12 (herein called the "Union"). At all times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

"Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

The collective bargaining agreement between the Union and the Employers at all times has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the agreement.

6. At all times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of the actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any

Individual Employer to make benefit payments of contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

7. At all times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board

of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

8. The Corporation has no authority over any pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (herein called a "defined contribution plan"), unless the defined contribution plan promises a fixed benefit and the employer or his representative participated in the determination of that benefit.

9. The Plan is a defined contribution plan under which no fixed benefit is promised.

10. The Trustees heretofore applied to the Corporation for a determination that the Plan is a defined contribution plan and that the Corporation has no

authority over the Plan. A true copy of the Trustees' written request for determination submitted to the Corporation is attached hereto as Exhibit "A" and by reference incorporated herein.

11. The Corporation has unlawfully and arbitrarily refused to determine the Plan to be a defined contribution plan, and has unlawfully and arbitrarily determined the Plan to be a defined benefit plan over which the Corporation exercises substantial control. A true copy of the written determination by the Corporation is attached hereto as Exhibit "B" and by reference incorporated herein.

12. The exercise of authority by the Corporation over the Plan has damaged the Trustees, and threatens further damage to the Trustees throughout the indefinite future, as follows:

(a) The Trustees have been required to pay and have paid to the Corporation the sum of $12,043.00 as a termination insurance premium in order to avoid assessment of a late payment charge not exceeding one hundred percent (100%) of

said amount, plus interest, and the Corporation threatens to require additional payments each in a similar or greater amount annually throughout the indefinite future.

(b) The Corporation has impaired the discretion and authority of the Trustees to administer the Plan in accordance with the Trust Agreement and the Plan by purporting to regulate, control and approve or disapprove modifications of the Plan by the Trustees.

(c) The Corporation's exercise of authority over the Plan violates and invalidates the express terms of the Trust Agreement and the Plan, which define the limit of the Employers' liability as the payments required by the collective bargaining agreements between the Employers and the Union, and substitutes therefor the unknown future cost of providing benefits described in the Plan. The Corporation requires the reporting of any amendment of the Plan which may decrease the benefit payable to any participant of the Plan, and the

Corporation purports to hold the authority to approve or disapprove any such amendment of the Plan. Pursuant to the Corporation's action, any amendment to the Plan which may increase the benefit payable to any participant of the Plan would correspondingly increase the liability of the Employers. Any such increase in liability of the Employers will cause bargaining between the Employers and the Union on the subject of the amendment to the Plan and thereby, deprives the Trustees of the discretion and control of the Plan necessary to perform their duties as fiduciaries to administer the Plan in the interest of the participants and in accordance with the terms of the Trust Agreement and the Plan.

(d) The Corporation imposes on the Employers and all other contributing employers of the Plan the risk of liability to the Corporation in an amount as much as thirty percent (30%) of the net worth of each employer. Further, the Corporation purports to have the authority to require the

Employers and all other contributing employers of the Plan to pay to the Corporation substantial sums in amounts presently unknown as premiums to insure against the above-described risk.

13. The Corporation contends that such damages are caused the Trustees and such additional risk and liability are imposed upon the Employers and all other contributing employers of the Plan through the enactment of federal statutory law creating and empowering the Corporation and modifying the rights and obligations of the Employers, the Union, the Trustees and the participants under the pre-existing collective bargaining agreements, Trust Agreement and Plan. The Trustees contend that such contentions by the Corporation are arbitrary and contrary to the express terms of the statutory enactment; further, that the Corporation's contentions directly contravene the express terms of the collective bargaining agreements, the Trust Agreement and the Plan and giving legal effect to such contentions will impair the valuable consensual contract

rights of the Employers, the Union, the Trustees and the participants; and, further, that the Corporation's actions and contentions hereinabove described seek and threaten to deprive the Employers, the Union, the Trustees and the participants of their just and lawful property without the due process of law and without just and adequate compensation.

14. The damages to the Trustees caused by the Corporation are continuing and irreparable. The Trustees have no complete remedy at law.

15. By reason of the foregoing, an actual controversy has arisen and exists between the Trustees and the Corporation with respect to whether the Corporation has erroneously applied the law to the facts to determine that the Plan is a defined benefit plan subject to the authority of the Corporation.

WHEREFORE, plaintiffs pray for damages, declaratory judgment and injunctive relief as follows:

1. Damages in the sum of $12,043.00, plus interest from the date

said sum was paid to defendant, plus such additional sums, if any, which proof may show were paid to defendant by plaintiffs prior to judgment herein, and interest thereon;

2. A declaratory judgment that the Plan is a defined contribution plan which does not promise a fixed benefit and which is not subject to the coverage or authority of defendant; and

3. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from acting in any manner inconsistent with the judgment of this court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

DATED: June 16, 1975.

/s/_____

Wayne Jett
Attorney for Plaintiffs

April 10, 1975

Pension Benefit Guaranty Corporation
P. O. Box 7119
Washington, D. C. 20044

Secretary of Labor
U. S. Department of Labor
P. O. Box 176
Washington, D. C. 20044

Attention: Labor Management Service Administration
Office of Employee Benefits Security

Re: Request for Determination of Status as Defined Contribution Plan
Operating Engineers Pension Trust
Department of Labor WP-154662
Employer Identification No. 95-603-2478

Gentlemen:

This firm is legal counsel for the Board of Trustees of the Operating Engineers Pension Trust. Pursuant to the instruction and authorization of the Board of Trustees, this letter hereby requests determination of whether the Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" ("defined contribution plan") or a "defined benefit plan" for the purposes of Section 4021(b)(1) of the Employee

Retirement Income Security Act of 1974 ("the Act"). The view of the Board of Trustees is that the Pension Plan is an "individual account plan".

STATEMENT OF THE FACTS

The principal office of the Operating Engineers Pension Trust ("the Trust") is located at 3055 Wilshire Boulevard, Suite 200, Los Angeles, California 90010. The Department of Labor WP number of the Trust is WP-154662. The Employer identification number (EIN) of the Trust is 95-603-2478. The Pension Plan ("the Plan") of the Trust has been in existence since June 1, 1960. The Trust is tax exempt under the provisions of Internal Revenue Code Section 501(a) and the Plan is a qualified pension plan within the meaning of IRC § 401(a).

The Trust is a joint labor-management trust formed and operated in compliance with Section 302(c)(5) of the Labor Management Relations Act of 1959 [29 U.S.C. § 186(c)(5)]. The written Agreement Establishing the Operating Engineers Pension Trust (the "Trust

Agreement") was executed December 13, 1960, on behalf of the International Union of Operating Engineers, Local Union No. 12 ("the Union"), a labor organization representing employees in an industry affecting commerce, and certain employer associations, including the Associated General Contractors of America, Southern California Chapter, and other employer associations ("the Employers"), representing employers in the construction industry in Southern California and Southern Nevada. The Trust was established by the parties to the Trust Agreement pursuant to collective bargaining agreements between the Union and the Employers which obligated the Employers to pay certain stated amounts of contributions into a trust to be organized for the purpose of receiving such contributions. The amount obligated by each signatory employer commenced at $.05 per hour of employment in 1960. That rate of contribution has been renegotiated through the process of collective bargaining at various intervals since 1960, and the currently effective

rate of contribution is $1.50 per hour worked (or paid) as to each covered employee. The applicable provisions of the collective bargaining agreement currently in effect in Southern California has substantially the same content as contained in various collective bargaining agreements in effect since 1960. The current provisions contained in Article IX, Paragraph A, and Appendix B of the Master Labor Agreement between Southern California General Contractors' associations and the Union are as follows:

> "A pension fund known as the Operating Engineers Pension Trust has been established by the Contractors and the Union by an Agreement and Declaration of Trust dated December 13, 1960, and subsequently amended by the parties to this Agreement. The Contractors agree to abide by said Agreement and Declaration of Trust and further to make payments to the Fund in the amount designated in Appendix B of this Agreement. Participation by the Contractors in said Trust shall be for the duration of this Agreement and any renewals or extensions thereof, or for the period workmen are employed under the terms of this Agreement."

"APPENDIX B"

CONTRIBUTIONS PAYABLE TO TRUST FUNDS

Effective Date July 1, 1974

PENSION TRUST (Article IX) $1.50

". . . The above contributions will be made on the basis of straight time or overtime hours worked or paid each employee under the terms of this Agreement."

The Trust Agreement provides for administration of the trust fund by a Board of Trustees ("the Trustees"). One-half of the total number of Trustees on the Board of Trustees are appointed by the Union, and the remaining Trustees are appointed by the Employers. The Trustees hold, control and manage the assets of the Trust either directly or in the name of a corporate co-trustee in a common pool for the exclusive benefit of employees, retired employees and their beneficiaries pursuant to the provisions of the Plan. No employee, retired employee or beneficiary is entitled to receive any part of the contributions made or required to be made by an employer in lieu of the

benefits provided by the Plan. No person has any right, title or interest in the assets of the Trust except as specifically provided in the Trust Agreement or in the Plan. Participants and beneficiaries are restrained by the Trust Agreement from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of any right or interest under the Plan. Interests under the Plan are not subject to transfer by operation of law or otherwise, and are exempt from legal or equitable process to the fullest extent permissible by law.

The Trust Agreement limits the scope of liability of the contributing employers in Article II, Section 7, thereof as follows:

"Neither the Employers nor any Signatory Association, nor officer, agent, employee or committee member of the Employers, or any Signatory Association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer

required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements." (Emphasis added.)

Article III of the Trust Agreement relates only to the collection of contributions obligated by the collective bargaining agreements, the employers' obligations to pay promptly, and remedies upon default by any employer.

The original Plan was attached to the Trust Agreement executed by the Union and the Employers. Thereafter, the Plan has been amended from time to time by the Trustees in accordance with the provisions of the Trust Agreement and the Plan.

The Plan provides for the accumulation of Prior Service Credits by each individual participant based upon yearly intervals of employment in the industry organized by the Union prior to the date the Plan was established (June 1, 1960). In addition, the Plan provides for the accumulation of Pension Credits by each individual participant, based upon one Pension Credit for each 1,000 hours of employment by a contributing employer after the date of commencement of the Plan at the rate of contribution stated in the Master Labor Agreement. However, if the contributing employer of the particular participant is obligated to pay contributions at a rate different from the Master Labor Agreement rate, then said participant accumulates Pension Credits in direct proportion to

the rate of contributions made on his behalf as compared to the Master Labor Agreement rate. For example, if a participant works 1,000 hours for an employer obligated to pay the Master Labor Agreement rate of $1.50 per hour, the participant acquires one Pension Credit for contributions amounting to $1,500.00. If another participant works for an employer obligated to pay only $1.00 per hour, then that participant acquires one Pension Credit for each 1,500 hours of employment. Thus, the Trustees maintain an individual account of hours worked by each participant and the rate of contributions paid by the employer for each such hour worked by that participant in the Plan.

The Plan provides for the payment of Normal Retirement, Early Retirement, Disability Retirement, Lump Sum Benefit at Retirement and Death benefits to a qualified participant or his beneficiary. The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable

rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 times $15.50 plus 10.5 times $8.00, or a total of $445.00 per month. Early Retirement and Disability Retirement benefits are computed in the same manner, except that Early Retirement benefits are actuarially reduced based upon the individual participant's age at the date of retirement. Death benefits are the payment of the monthly pension amount to a designated beneficiary for a period of ten years (plus, in the case of active participants, a lump sum equivalent to the lump sum benefit at retirement described below), less the number of pension payments made to the participant prior to death, or at the participant's option a lump sum equal to $1,500.00 times the number of accumulated Pension Credits, less any retirement

benefits paid prior to death. Also, the Plan provides for payment of lump sum benefits at retirement equal to $250.00 times the number of accumulated Pension Credits, not exceeding ten, of the individual participant.

Since its inception and presently, the Plan has contained provisions limiting the liability of the contributing employers in Article VII, Section 4, thereof as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient asset to permit continued payments under this Pension

> Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Associations, Individual Employer, or the Union to provide the benefits established by this Plan if the Pension Fund does not have assets to make such benefit payments." (Emphasis added.)

Further, the Plan has contained since its inception a provision for actuarial review in Article VIII, Section 2, thereof as follows:

> "This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension

Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan." (Emphasis added.)

On or before December 2, 1974, the Trust filed Form No. PBGC-1 with the Pension Benefit Guaranty Corporation as if the Plan were included in coverage of the plan termination insurance provisions of the Act. The Trust paid the estimated premium as set forth in Form No. PBGC-1 at that time in order to avoid any possible liability for interest and penalties which may be assessed under the Act in the event the Plan is determined to be a "defined benefit plan".

ANALYSIS

Section 4021 of the Act establishes the coverage of the plan termination insurance provisions (Sections 4001, et seq.) and, in Section 4021(b), provides as follows:

"(b) This section does not apply to any plan--

(1) which is an individual account plan, as defined in paragraph (34) of section 3 of this Act . . ."

Paragraph (34) of Section 3 of the Act provides as follows:

"(34) The term 'individual account plan' or 'defined contributions plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

"(c)(1) For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

The Plan appears to be within the definition contained in Paragraph (34) of Section 3 of the Act in that the Plan as described above provides for an individual account for each participant and for benefits solely upon the amount

contributed to the participant's account, and any income, expenses, gains and losses experienced by the Trust. In accordance with IRC § 401(a)(8), the Plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the Plan. However, forfeitures do occur under certain break-in-service provisions of the Plan, and the purpose of IRC § 401(a)(8) appears to be to assure that conservative actuarial assumptions are used in designing the Plan. The requirement of Paragraph (34) of Section 3 for "an individual account for each participant" appears to be fully satisfied by current accounting for and recording of each and every hour worked by the individual participant and the concurrent recording of the contribution rate per hour of the related employer. This practice of maintaining the "individual account" is followed in order to achieve an accurate measurement of the entitlement of the individual participant, rather than accounting for actual funds as received on such participant, because

the related employer may become delinquent by failure to pay timely contributions on one or more of his employees.

Further, the requirement of Paragraph (34) of Section 3 for "benefits based solely upon the amount contributed" is a clear reference to the "defined contribution" or "money-purchase" approach to providing retirement benefits. By this approach, the employer agrees to make certain payments into a plan, and any benefits to be provided are limited solely to whatever can be purchased with the obligated contribution. This approach contrasts with the "defined benefit" approach by which an employer promises certain benefits upon retirement and thereby becomes obligated to pay into the plan whatever contributions are necessary to provide the promised benefits. The Plan has at all times since its inception in 1960 expressly limited the liability of all contributing employers to the payment of certain contributions defined in the collective bargaining agreements. Article II, Section 7, of the Trust Agreement and

Article VII, Section 4, of the Plan are self-explanatory and fully comprehensive in limiting the liability of each contributing employer to payment of the specific rate per hour as bargained for and set forth in each respective collective bargaining agreement.

Based upon the foregoing, it appears that the Plan is an individual account plan as defined in Paragraph (34) of Section 3 of the Act. Thus, the only remaining question is whether Section 4021(c)(1) of the Act in any manner affects the Section 4021(b)(1) exclusion of the Plan from coverage by plan termination insurance. Review of Section 4021(c)(1) indicates this question is properly answered in the negative. Again, Section 4021(c)(1) provides as follows:

> "For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." (Emphasis added.)

Certain of the Trustees of the Trust are representatives of the contributing employers, and such Trustees have participated in adopting and amending the various provisions of the Plan relating to design of the benefits program. However, it is clear that the Plan is not one under which "a fixed benefit is promised". The benefits of the Plan are not "fixed" because such benefits are expressly required to vary according to the sufficiency of the obligated contributions to provide for the described benefits. Also, the benefits of the Plan are not "promised" except upon the express conditions set forth in Article II, Section 7, of the Trust Agreement and Article VII, Section 4, of the Plan. Thus, since no fixed benefit is promised by the Plan, Section 4021(c)(1) does not exclude the Plan from the term "individual account plan" for the purposes of Section 4021(b)(1).

CONCLUSION

The Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" or "defined contribution

plan" as defined in Paragraph (34) of Section 3 of the Act for purposes of Section 4021(b)(1) of the Act and is, therefore, excluded from coverage by the plan termination insurance provisions of the Act.

The Trustees respectfully request your written determination of this inquiry. In the event any determination contrary to the above conclusion is tentatively foreseen, we respectfully request an opportunity for an informal conference to discuss the related criteria for determining this matter. Please direct your response to the undersigned at the letter-head address given above.

Very truly yours,

/s/

Wayne Jett

WJ:pb

cc: Mr. John L. Connolly
Mr. Joseph H. Seymour
Mr. Leo A. Majich
Mr. Harley B. Blankenship

EXHIBIT A

May 21, 1975

Wayne Jett, Esq.
Wilshire Centre
Suite 420
3055 Wilshire Boulevard
Los Angeles, California 90010

Dear Wayne:

This is in response to your letter of April 10, 1975 requesting a determination of "whether the Pension Plan of the Operating Engineers Pension Trust is an 'individual account plan' ('defined contribution plan') or a 'defined benefit plan' for the purposes of Section 4021(b)(1) of the Employee Retirement Income Security Act of 1974 ('the Act')."

As a result of our telephone conversation on Friday, May 9, 1975, the legal staff of the Pension Benefit Guaranty Corporation ("PBGC") reexamined the case file and an opinion was also obtained from the PBGC Office of Program and Policy Development. On the basis of the documents submitted by you it appears that the Operating Engineers Pension Trust is a defined benefit plan for the purposes of Section 4021(b)(1).

EXHIBIT B

As you know, Section 4021(b) provides that:

> "This Section does not apply to any plan -- (1) which is an individual account plan, as defined in paragraph (34) of Section 3 of this Act. . . ."

Paragraph (34) of Section 3 of the Act provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The definition set forth in Section 3(34) is limited by Section 4021(c)(1) which provides:

> "For the purposes of subsection (b) (1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Section III of the Pension Plan sets forth various "pension factors" which are utilized to determine the

amount of the monthly benefit a retiree is to receive. In your letter of April 10, 1975 (p. 5) you stated that benefits are determined in the following fashion:

> "The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 times $15.50 plus 10.5 times $8.00 or a total of $445.00 per month."

This method of computing a participant's pension benefit appears to be a formula based on service and thereby is within the class of plans we call defined benefit plans, rather than an individual account plan. (See also Section 4021(c)(1) of the Act.)

I hope this information proves helpful to you and will be of assistance

in future evaluation of your Pension Plan. If you would like to discuss the matter further, either by telephone or in person, I would be glad to do so.

Sincerely,

/s/

Henry Rose
General Counsel